

DEPARTMENT OF STATE REVENUE

LETTER OF FINDINGS NUMBER: 97-0423 RST

**Sales/Use Tax — Continental Breakfasts
Tax Administration — Penalty and Interest
For Tax Periods: 1992 through 1994**

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Sales/Use Tax — Continental Breakfasts

Authority: IC 6-2.5-5-20
Hyatt Corp. v. Department of State of Revenue, 695 N.E.2d 1051 (Ind.Tax 1998)

Taxpayer protests the proposed assessment of Indiana use tax on its coffee and breakfast expenditures incurred in providing complimentary continental breakfasts to its customers.

II. Tax Administration — Penalty

Authority: IC 6-8.1-10-2; IC 6-8-10-2.1
45 IAC 15-11-2; 45 IAC 2.2-3-20

Taxpayer protests the imposition of interest and ten-percent (10%) negligence penalty.

STATEMENT OF FACTS

Taxpayer owns and operates several motels located in Indiana. Taxpayer offers, as part of its guest amenity package, a complimentary continental breakfast. This breakfast, which is served in the hotel lobby, typically includes bagels, sweet rolls and fresh fruit, along with coffee and

juice. Taxpayer did not pay Indiana gross retail tax (sales tax) or self-assess use tax on these items.

I. Sales/Use Tax — Continental Breakfasts

DISCUSSION

Taxpayer protests proposed assessments attributable to its breakfast and coffee expenditures.

Taxpayer, an operator of motels, provides a complimentary continental breakfast to its guests. In its acquisition of breakfast staples, taxpayer has purchased food and beverages. As sales tax was not paid on these purchases, use tax was subsequently assessed by Audit.

In Indiana, an excise tax (sales tax) is imposed on retail transactions. A complimentary excise tax (use tax) is imposed on tangible personal property that is stored, used, or consumed in this state. Several exemptions from these taxes are available.

One exemption is provided for the sale of food intended for human consumption. As IC 6-2.5-5-20 instructs:

(a) Sales of food for human consumption are exempt from the state gross retail tax.

(b) For purposes of this section, the term "food for human consumption" includes:

(1) cereals and cereal products; (2) milk and milk products, including ice cream; (3) meat and meat products; (4) fish and fish products; (5) eggs and egg products; (6) vegetables and vegetable products; (7) fruit and fruit products, including fruit juices; (8) sugar, sugar substitutes, and sugar products; (9) coffee and coffee substitutes; (10) tea, cocoa, and cocoa products; (11) spices, condiments, extracts, and salt; (12) oleomargarine; and (13) natural spring water.

(c) For purposes of this section, the term "food for human consumption" does not include:

(1) candy, confectionery, and chewing gum; (2) alcoholic beverages; (3) cocktail mixes; (4) soft drinks, sodas, and other similar beverages; (5) medicines, tonics, vitamins, and other dietary supplements; (6) water (except natural spring water), mineral water, carbonated water, and ice; (7) pet food; (8) food furnished, prepared, or served for consumption at a location, or on equipment, provided by the retail merchant; (9) meals served by a retail merchant off the merchant's premises; (10) food sold by a retail merchant who ordinarily bags, wraps, or packages the food for immediate consumption on or near the merchant's premises, including food

sold on a "take out" or "to go" basis; and (11) food sold through a vending machine or by a street vendor.

From a reading of the statute, one can see that "food for human consumption" is a term of art. It does not include all that is edible. Subsection (b) defines the term by listing inclusions; subsection (c) limits through exclusion.

In *Hyatt Corp. v. Department of State of Revenue*, 695 N.E.2d 1051 (Ind.Tax 1998), the court defined the scope of IC 6-2.5-5-20 - the "food for human consumption" exemption. Petitioner, a hotel operator, sought a refund for use tax paid on food purchased for complimentary meals - meals provided to guests and employees. The court, in reaching its decision, reasoned that if the food purchased was exempt as "food for human consumption" under subsection (b), and not excluded from the exemption under subsection (c), the exemption must apply. *Id.* at 1054. The court commented that a subsequent use of exempt food would not effect its original exempt status. As the court stated:

The fact that Hyatt eventually prepared the food it had purchased is irrelevant. Eligibility for this [food for human consumption] exemption provision does not turn on what is done with the food after the relevant [sales] transaction.

Id. at 1055, footnote 6.

What was important to the court in *Hyatt* was the fact that petitioner had purchased *unprepared* food. In interpreting the exclusionary language of subsections (c)(8) through (c)(11), the court found "the legislature intended to exclude transactions involving *prepared* food from the definition of 'food for human consumption.'" *Id.* (Emphasis added.) Since Hyatt purchased food covered by the subsection (b) exemptions, and the food, as unprepared, could not have been obtained in an exclusionary transaction, the court found Hyatt's food purchases qualified for exempt treatment.

Taxpayer's position is similar to that of Hyatt. Taxpayer purchased unprepared food items and beverages – e.g., bagels, rolls, fruit, coffee, and fruit juices. These items are included in the subsection (b) list of exempt items. As unprepared food, these items were not obtained in an exclusionary sales transaction. Consequently, the Department finds that taxpayer's food and beverage purchases, like that of Hyatt, are exempt from sales and use tax under IC 6-2.5-5-20.

FINDING

Taxpayer's protest is sustained.

II. Tax Administration — Penalty and Interest

DISCUSSION

The taxpayer protests the imposition of the ten-percent (10%) penalty.

The negligence penalty imposed under IC 6-8.1-10-2.1(e) may be waived by the Department where reasonable cause for the deficiency has been shown by the taxpayer. Specifically:

The department shall waive the negligence penalty imposed under IC 6-8.1-10-2.1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. 45 IAC 15-11-2(e).

As taxpayer was successful in its protest, further discussion of the negligence penalty is unnecessary.

FINDING

The taxpayer's protest is sustained.